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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 810.

JOHN BAIZLEY IRON WORKS and THE OCEAN ACCIDENT & GUARANTY CORPORATION, Limited, Appellants,

v.

ABRAHAM SPAN.

ON APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR APPELLANTS.

OWEN J. ROBERTS,
Counsel for Appellants.

CHARLES A. WOLFE,
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Of Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

SUBJECT INDEX.

PAGE

I. REFERENCE TO THE OFFICIAL REPORTS OF THE OPINIONS DELIVERED BY THE COURTS BELOW.... 1

II. STATEMENT OF THE CASE..... 2

III. SPECIFICATION OF ERRORS..... 4

IV. ARGUMENT..... 6

SUMMARY OF THE ARGUMENT:

POINT A. The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of Southern Pacific Company *v.* Jensen, 244 U. S. 205, has been consistently adhered to by this Court..... 8

I. Constitutional and statutory provisions upon which the doctrine is based..... 8

II. The doctrine defined..... 9

III. The doctrine remains unimpaired notwithstanding the attacks upon it..... 13

(*a*) It cannot be destroyed by congressional legislation..... 14

(*b*) It is not based upon the nature of a particular statute—whether compulsory or elective... 16

PAGE

(*c*) An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act..... 24

(*d*) The doctrine is not limited to claims against the owner of the vessel..... 26

(*e*) No case presents a "matter of mere local concern" is which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters..... 27

POINT B. The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in performing repairs to and upon a steamship lying in navigable waters, is unconstitutional..... 45

PAGE

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.... 48

II. The terms of the general contract of employment between the parties are unimportant..... 52

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce..... 54

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act..... 57

CONCLUSION..... 64

TABLE OF CASES CITED.

Alaska Packers Ass'n *v.* Industrial Accident Commission, 276 U. S. 467.....33–34

Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52. 55

Clyde Steamship Co. *v.* Walker, 244 U. S. 255... 61

Danielsen *v.* Morse Dry Dock Co., 235 N. Y. 439 (1923) (s. c. 262 U. S. 756).....27, 56

Doey *v.* Howland, 224 N. Y. 30 (1918) (s. c. 248 U. S. 574).....35–36, 56

Gonsalves *v.* Morse Dry Dock Co., 266 U. S. 171..37, 56

Grant Smith-Porter Co. *v.* Rohde, 257 U. S. 469..16–19, 28, 50

Great Lakes Dredge & Dock Co. *v.* Kierjewski, 261 U. S. 479.....36–37, 55

International Stevedoring Co. *v.* Haverty, 272 U. S. 50.....26, 55

PAGE

James Rolph Co. *v.* Ind. Accident Com., 220 Pac. 669 (1923) (s. c. 264 U. S. 219).....25, 61–62

Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149..12, 61

London Guarantee & Accident Co. *v.* Ind. Accident Com., 73 L. ed. 368 (U. S. Sup. Ct. Adv. Op. 5/1/29).....42–44, 62

March *v.* Vulcan Iron Works, 102 N. J. L. 337 (1925) (s. c. 271 U. S. 682).....20, 27, 56, 63

Messel *v.* Foundation Co., 274 U. S. 427..27, 39–40, 56

Millers Indemnity Underwriters *v.* Braud, 270 U. S. 59 (s. c. 245 S. W. 1025 (1922); Texas Civ. App.)..29, 50

Matter of Lahti *v.* Terry & Tench, 240 N. Y. 292 (1925) (s. c. 273 U. S. 639)..... 22

New Bedford Dry Dock *v.* Purdy, 258 U. S. 96.. 46

Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142; 73 L. ed. 99.....23, 27, 41–42, 53

Peters *v.* Veasey, 251 U. S. 121..... 19

Robins Dry Dock Co. *v.* Dahl, 266 U. S. 449..38, 46, 56

Rosengrant *v.* Havard, 273 U. S. 664 (s. c. 211 Ala. 605 (1924); 213 Ala. 202 (1925)).....31–32

Smith & Son *v.* Taylor, 276 U. S. 179..... 33

Southern Pac. Co. *v.* Jensen, 244 U. S. 205...9–11, 59, 60

Southern Surety Co. *v.* Nina Crawford, 274 S. W. 280 (1925) (s. c. 270 U. S. 655).....30–31

State Ind. Com. *v.* Nordenholt, 259 U. S. 263...28–29, 51

State Ind. Board of New York *v.* Terry & Tench Co., 273 U. S. 639.....22, 31

Sultan Rwy. & Tim. Co. *v.* Dep't of Labor, 277 U. S. 135.....34–35

The Robert W. Parsons, 191 U. S. 17..... 46

Union Fish Co. *v.* Erickson, 248 U. S. 308..... 51

Washington *v.* Dawson & Co., 264 U. S. 219.....15, 62

TABLE OF STATUTES CITED.

PAGE

1. Federal

Act of September 24, 1789, c. 20 § 9; 1 Stat. 76 8

Judicial Code § 24 (U. S. C. Title 28 § 41) R. S. § 563; March 3, 1911, 36 Stat. 1091, c. 231 § 24; October 6, 1917, 40 Stat. 395, c. 97 § 1; June 10, 1922, 42 Stat. 634, c. 216 § 1 ..... 9, 12, 14

Judicial Code § 256 (U. S. C. Title 28 § 371) R. S. § 711; March 3, 1911, 36 Stat. 1160 c. 231 § 256; October 6, 1917, 40 Stat. 395, c. 97 § 2; June 10, 1922, 42 Stat. 635, c. 216 § 2 ..... 9, 14

Act of June 5, 1920, 41 Stat. 1007, c. 250 § 33 (U. S. C. Title 46 § 688) 42

2. Pennsylvania

Act of June 2, 1915, P. L. 736, Art. III §§ 301, 302(a), 305 48–49

Act of June 2, 1915, P. L. 769, § 1 24

Act of June 26, 1919, P. L. 642, § 401, Art. IV P. L. 659 24

Act of April 7, 1921, P. L. 114 (No. 67), § 1 .. 49

OTHER AUTHORITIES CITED.

73 University of Pennsylvania Law Review 123, 223 (1925) 13

38 Yale Law Journal, 472 (1929) 13

75 University of Pennsylvania Law Review 382 (1927) 14

40 Harvard Law Review 485 (1927) 23

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Superior Court of Pennsylvania, delivered by Linn, *J.* (R. 16), is reported in *Span* v. *Accident and Guarantee Corporation,* 92 Pa. Super. Ct. 418.

The opinion of the Supreme Court of Pennsylvania, delivered by Moschzisker, *C. J.* (R. 20), is reported in *Span* v. *John Baizley Iron Works, et al.,* 295 Pa. 18.

II.

STATEMENT OF THE CASE.

This case arose upon a claim for compensation under the Workmen's Compensation Act of Pennsylvania made by the appellee, Abraham Span, a blacksmith's helper, against his employer, John Baizley Iron Works, one of the appellants.

At the time the injuries in question were sustained, to wit, on January 13, 1926, the John Baizley Iron Works was engaged in performing certain repairs to the steamship "Bald Hill," including, *inter alia,* the painting of the iron in the engine room and repairs to the floor of the engine room. The said vessel had theretofore steamed to Philadelphia for the necessary repairs, and at the time of the accident was tied up to Pier 98, South, in the Delaware River, at Philadelphia (R. 2, 4, 19). The appellee, Span, in the course of his said employment by the said appellant was painting angle irons in the engine room of the vessel when he called to a fellow employee, operator of an acetylene torch, asking him "to burn the iron on the other side" (R. 5). Sparks from the torch entered Span's right eye (R. 8) and caused injuries resulting in the alleged disability of the claimant.

An award of compensation was made by the Referee against the Ocean Accident and Guarantee Corporation, Ltd., the employer's insurance carrier (R. 9), which award was affirmed on successive appeals to the Workmen's Compensation Board (R. 10), the

Court of Common Pleas No. 4 of Philadelphia County (R. 13), the Superior Court of Pennsylvania (R. 16), and the Supreme Court of Pennsylvania (R. 19), notwithstanding the appellants' contention that the rights, liabilities and remedies of the parties could be determined only by the general maritime law, and that the Pennsylvania Workmen's Compensation Act, as construed by the said Courts to be applicable to this case, would be repugnant to the well-known provisions of the Constitution and laws of the United States hereinafter referred to.

III.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Pennsylvania erred in finding and holding that the appellee was entitled to compensation under the Pennsylvania Workmen's Compensation Act and in failing to sustain appellants' contention that the appellee's cause of action, if any, was cognizable solely by the general maritime law.

2. The Supreme Court of Pennsylvania erred in finding and holding: "* * * while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any 'direct' relation to those subjects" (R. 33).

3. The Supreme Court of Pennsylvania erred in finding and holding: "* * * since his contract of general employment is not shown to be other than a land contract, the mere incident that its performance carried plaintiff temporarily on navigable waters, was not sufficient to cause that employment, and the rights and liabilities which pertain to it, to be so deprived of their essential local character that admiralty would take jurisdiction to the exclusion of a helpful state law" (R. 34).

4. The Supreme Court of Pennsylvania erred in finding and holding: "As we view it, there is noth-

ing in the situation here presented which will cause material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity if the rights of the parties, between themselves, are adjudged according to the local statute; therefore, we hold that the Pennsylvania Workmen's Compensation Act was properly applied" (R. 36).

IV.

ARGUMENT.

Summary of the Argument.

Point A. The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of Southern Pacific Company *v.* Jensen, 244 U. S. 205, has been consistently adhered to by this Court.

I. Constitutional and statutory provisions upon which the doctrine is based.

II. The doctrine defined.

III. The doctrine remains unimpaired notwithstanding the attacks upon it.

(*a*) It cannot be destroyed by congressional legislation.

(*b*) It is not based upon the nature of a particular statute—whether compulsory or elective.

(*c*) An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act.

(*d*) The doctrine is not limited to claims against the owner of the vessel.

(*e*) No case presents a "matter of mere local concern" in which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters.

Point B. The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in perfoming repairs to and upon a steamship lying in navigable waters, is unconstitutional.

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.

II. The terms of the general contract of employment between the parties are unimportant.

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce.

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act.

POINT A.

The principle of uniformity in admiralty and maritime matters required by the federal constitution, as defined in the case of *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, has been consistently adhered to by this Court.

I. Constitutional and statutory provisions upon which the doctrine is based.

Article III, Section 2, Clause 1 of the federal constitution extends the judicial power of the United States "to all Cases of admiralty and maritime Jurisdiction."

Article I, Section 8, Clause 18 grants to Congress the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

In pursuance of the foregoing constitutional provisions, Congress has passed various laws relating to jurisdiction over admiralty and maritime causes. Section 9 of the Judiciary Act, September 24, 1789 c. 20 (I Stat. 76) provided:

> "That the district courts shall have, exclusively of the courts of the several States * * * exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; * * *."

This enactment was carried into the Revised Statutes, Sections 563 and 711, and thence into the Judicial Code, Section 24; 36 Stat. 1091, in which it is provided:

> "The district courts shall have original jurisdiction as follows: * * *.
>
> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, * * *,"

and Judicial Code, Section 256; 36 Stat. 1160, in which it is provided:

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *
>
> "Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, * * *."

II. The Doctrine Defined.

The first case in which this Court considered the constitutionality of a state Workmen's Compensation Act when applied to a maritime cause, was the case of

Southern Pacific Co. v. Jensen, 244 U. S. 205.

Jensen, the deceased workman, was employed as a stevedore by the Southern Pacific Company, a Kentucky corporation, which was a common carrier by railroad and also owned the steamship "El Oriente"

plying between the ports of New York and Galveston, Texas. While assisting in the unloading of the vessel, then berthed at Pier 49, North River, N. Y., Jensen sustained injuries on board the vessel which caused his death. A claim petition was filed under the Workmen's Compensation Act of New York and an award was made which was affirmed by the New York courts.

On appeal to this Court, Mr. Justice McReynolds, speaking for the majority, after reviewing the provisions of the federal constitution and statutes above referred to, said (p. 216):

> "In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, * * *; pilotage fees fixed, * * *; and the right given to recover in death cases, * * *. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty, * * *; nor create liens for materials used in repairing a foreign ship, * * *. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the char-

acteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself."

Returning to a consideration of the facts in the case before the Court, he said (p. 217):

"The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60.

"If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."

It was then held that the remedy which the New York compensation statute attempted to give was of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and was not saved to suitors from

the grant of exclusive jurisdiction to the Federal District Courts; that the New York legislature exceeded its authority in attempting to extend the statute to conditions such as were there disclosed; and that the said Compensation Act, as so applied, conflicted with the constitution, and to that extent was invalid.

Three years later, in the case of

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149,

this Court again considered the constitutionality of the New York Compensation Statute, in the light of the amendment by Congress to the Judiciary Act (October 6, 1917, c. 97, 40 Stat. 395), adding to the saving clause, the words: "* * * and to claimants the rights and remedies under the workmen's compensation law of any state."

In holding this attempted amendment unconstitutional, Mr. Justice McReynolds, again speaking for the majority, further defined and clarified the doctrine of uniformity in admiralty matters adopted by this Court, saying (p. 160):

> "As the plain result of these recent opinions and the earlier cases upon which they are based, we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States

all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."

III. The Doctrine remains unimpaired notwithstanding the attacks upon it.

The issue in the case at bar is, we believe, beyond the realm of legal philosophy and legal theory, and we do not propose therefore to enter into a discussion of the history of the development of the uniformity doctrine, or of the principles of constitutional construction and public policy which led to its adoption. Much has been written on these subjects since the decision in the *Jensen case*.*

But the criticism of and attacks upon the doctrine of the *Jensen case* have not prevailed. The doctrine has become definitely established as part of the general maritime law, and this Court has consistently applied and adhered to it, notwithstanding the constant efforts of various courts and admiralty lawyers to evade and circumvent it. Indeed the persistency of such efforts is almost inexplicable—they are due

* See, for example, Wright, Uniformity in the Maritime Law of the United States, 73 U. of Pa. L. Rev. 123, 223 (1925); Morrison, Workmen's Compensation Law and the Maritime Law, 38 Yale Law Journal 472 (1929).

in part, perhaps, to the age old conflict between the admiralty and the common law courts, and in part, perhaps, to the jealousy of the state courts over the limits of their jurisdiction, but the persistency of such efforts can probably be ascribed chiefly to the ignorance by the state courts of the broad principles of public policy which led this Court to adopt and adhere to the uniformity doctrine in admiralty matters.*

(a) *It cannot be destroyed by congressional legislation.*

The opponents of the doctrine first attributed it to the supposed inadequacy of the saving clause in Section 9 of the Judiciary Act above referred to and accordingly enlisted the aid of Congress in their cause with the result that within six months after the decision in the *Jensen case* the amendment to the Judiciary Act was adopted which this Court considered in the *Knickerbocker case (supra).*

Another effort in the same direction was made by Congress in the amendment to the Judiciary Act of June 10, 1922, c. 216, 42 Stat. 634 (Judicial Code, Sections 24 and 256; U. S. C. Title 28, Sections 41 and 371). This amendment sought to add to the saving clause the words: "* * * and to claimants for compensation for injuries to or death of persons

* Prof. Biklé in his review of Dean Hall's second edition of Cases on Constitutional Law said (75 U. of Pa. L. Rev. 382, February, 1927): "All of the new cases are decisions of the Supreme Court of the United States, a fact that tends, perhaps through no intention of the editor, to indicate how seldom it is that a State court deals adequately with a question of constitutional law arising under the Federal Constitution."

other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States."

This attempt to avoid the effect of the *Jensen case* met with the same fate as the previous one. The amendment was considered by this Court in the cases of *State of Washington* v. *Dawson & Co.,* and *Industrial Accident Commission of California* v. *James Rolph Co.,* decided by one opinion *sub nom.*

State of Washington v. Dawson & Co., 264 U. S. 219.

It was there contended that the doctrine of the *Jensen case* had been modified by the later decisions in *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469 (post), and *Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263 (post), but Mr. Justice McReynolds, again speaking for the majority, after reviewing the cases, said (p. 228):

> "This cause presents a situation where there was no attempt [by Congress] to prescribe general rules. On the contrary, the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within

the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interests must yield to the common welfare. The Constitution is supreme."

(b) *It is not based upon the nature of a particular statute—whether compulsory or elective.*

In addition to this line of attack upon the doctrine of uniformity in admiralty matters, its opponents have persistently endeavored to limit its application to the precise facts in the *Jensen case.* Practically every fact which was disclosed by the record in that case has been seized upon as a basis for distinguishing the case from other cases in which such fact did not appear.

The New York Workmen's Compensation Act considered in the *Jensen case* was of the compulsory type. Critics of the decision immediately attempted to distinguish all cases in which the Compensation Act in question was of the elective type,* and professed to find support for such a distinction in the case of

Grant Smith-Porter Co. v. Rohde, 257 U. S. 469.

In that case, the claimant, while employed as a carpenter engaged in construction work on board an uncompleted vessel lying in navigable waters in the

* The decision of the Superior Court of Pennsylvania in the case at bar was based upon this alleged distinction, as the Pennsylvania Workmen's Compensation Act is of the elective type.

State of Oregon, was injured. A libel *in personam* was filed against his employer to recover damages, and judgment was rendered for the plaintiff by the District Court sitting in admiralty. The defendant appealed to the Circuit Court of Appeals which certified to this Court for instructions, the following questions:

> "1. Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters?
>
> "2. Is libellant entitled because of his injury to proceed in admiralty against respondent for the damages suffered?"

It appeared that the Oregon Workmen's Compensation Law was of the elective type and that the remedy provided therein, was made exclusive of all other claims against the employer. Mr. Justice McReynolds, speaking for this Court, in the first place pointed to the fact that the work upon which Rohde was engaged at the time of the accident was not maritime in nature, and said (pp. 475-6):

> "The contract for constructing 'The Ahala' was non-maritime, and although the incompleted structure upon which the accident occurred was lying in navigable waters, neither Rohde's general employment, nor his activities at the time had any direct relation to navigation or commerce."

It was obvious, since the contract of employment was non-maritime and the activities of the claimant at the time his injuries were sustained had no direct

relation to navigation and commerce, that no characteristic feature of the maritime law was affected, and that the application of the state act would not interfere with the proper harmony and uniformity of the maritime law in its international or interstate relations,—that it was a "matter of mere local concern."

In answer to the certified questions, the opinion proceeded to state (pp. 477-8):

> "Construing the first question as meaning to inquire whether the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a State, we answer, yes.
>
> "Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

Since the matter was of mere local concern for the reasons above noted, it is clear that the decision was in no sense a "trek backward" from the doctrine of the *Jensen case,* as it was hailed in some quarters. The uniformity doctrine forbids the application of such state legislation, only, as will work material prejudice to characteristic features of the general maritime law or will interfere with the proper harmony and uniformity of that law in its international and interstate relations. Under the circumstances

disclosed in the *Rohde case,* the doctrine therefore was not at all involved. This fact was clearly indicated in the opinion in the following language (p. 477):

> "This conclusion accords with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Union Fish Co.* v. *Erickson,* 248 U. S. 308; and *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. In each of them the employment or contract was maritime in nature and the rights and liabilities of the parties were prescribed by general rules of maritime law essential to its proper harmony and uniformity. Here the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential."

Opponents of the uniformity doctrine, however, disregarding the fundamental difference between the *Rohde case* and the *Jensen case,* have interpreted it to stand for the proposition that while a compulsory state workmen's compensation act could not be permitted to work material prejudice to any characteristic feature of the general maritime law, a so-called "elective" workmen's compensation act would be applied to a maritime cause even though characteristic features of the general maritime law were involved.

A prompt answer to this contention could have been found in the case of

Peters v. Veasey, 251 U. S. 121,

decided before the *Rohde case,* in which it was held that the Workmen's Compensation Law of Louisiana—an elective act—could not be applied to regulate the rights and remedies of a stevedore injured on board a vessel lying in navigable waters, although the defendant in error in that case made no contention based upon the elective features of the act.

This alleged distinction, however, met with some success in various state courts, including, as has been observed, the Superior Court of Pennsylvania in the case at bar. Other courts were not mislead. In the case of

March v. Vulcan Iron Works, 102 N. J. L. 337 (1925),

it appeared that the defendant iron works owned a floating dry-dock in which were placed vessels undergoing repairs. Deceased was a foreman in the defendant's boiler ship and it was his duty to supervise the construction of boilers for the defendant as well as to inspect boilers on vessels being repaired by the defendant. While climbing a ladder from the deck of the dry-dock to the deck of a vessel undergoing repairs therein, he fell to the deck of the dry-dock and sustained injuries resulting in his death. A claim was filed for compensation under the New Jersey statute, the claimant contending that under the decision in the *Rohde case,* the local compensation act could be applied because it was of the elective type. The New Jersey courts held, however, that the *Rohde case* did not establish such a distinc-

tion, and a petition for a certiorari was subsequently denied by this Court (271 U. S. 682).

It seems clear that if characteristic features of the maritime law are involved in the rights of stevedores or other persons engaged in maritime employment, who may be injured on navigable waters, those features are prejudiced when they are superseded by an exclusive state law whether the parties have so elected or not. This proposition is self evident: if a ship owner were required to ascertain the local law at every port into which his vessels entered, or a company engaged at various ports in repairing vessels were obliged to ascertain the local law at every port to which its employees might be sent in the performance of their duties, in order to determine whether that local law included a workmen's compensation act which might be either compulsory or elective, and in the latter case to determine what steps must be taken to avoid the application of the local act so that the rights and remedies of persons on board the vessels could be governed by the general maritime law, the result would be as serious a fettering of trade as though the local law in each instance sought to compel such persons to submit to its jurisdiction.

Certainly the parties cannot by their own election, with or without state sanction, secure to state tribunals a jurisdiction which it is beyond the power of Congress to grant. Indeed, while such an act as the Pennsylvania Workmen's Compensation Act is

referred to as an "elective" act, it seems rather illusory to give it such an appellation. The right to elect not to be bound by the act is in the nature of a condition subsequent and it is well known that a real election is seldom, if ever, consciously made by the parties; the result being that the remedial provisions of the act are almost invariably enforced.

This Court has itself expressly disaffirmed the existence of such a distinction between the effect of a compulsory act and an elective compensation act in the case of

State Industrial Board of New York v. Terry & Tench Co., 273 U. S. 639,

in which a decision of the New York Court of Appeals reported *sub nom. Matter of Lahti* v. *Terry & Tench Co.*, 240 N. Y. 292, was "Reversed upon the authority of *Miller's Indemnity Underwriters* v. *Braud, et al.*, 270 U. S. 59."

It appeared in that case that the claimant was injured while standing on a floating raft employed in the construction of a pier in New York Bay. The floating raft was not a vessel which could be used in commerce and the New York Court pointed out that while the plaintiff's injury was maritime, the contract of employment was not.

An award was made under the workmen's compensation act, but the New York Court of Appeals unanimously reversed the award. It construed the *Jensen case* to stand for the principle that the law of the sea could not be displaced by a compulsory

compensation act, and interpreted the *Rohde case* to stand for the proposition that the parties might elect to be governed by a workmen's compensation act, instead of admiralty rules.

The reversal of that decision by this Court in a *per curiam* opinion has been criticized,* but fifteen cases had been considered by this Court since the *Jensen case* in which the uniformity doctrine had been discussed and clarified, and we suspect that the summary treatment accorded the decision of the New York Court of Appeals was an indication of the growing impatience of this Court with the obtusity so often shown by some state courts in overlooking the fundamental principles enunciated in the *Jensen case,* and endeavoring to avoid their application by an alleged distinction, which was in fact not a distinction.

If any doubt remained as to the attitude of this Court toward the contention that an elective compensation act could be applied to a maritime cause, it was completely dispelled by the decision in the case of

Northern Coal & Dock Co. v. Strand, 278 U. S. 142; 73 L. ed. 99.

Compensation had been granted under the Workmen's Compensation Act of Wisconsin—of the elective type—to the widow of the decedent, who died as a result of injuries sustained while he was assisting with the unloading of a vessel lying in navigable

*40 Harvard Law Rev. 485.

waters. Commenting upon the provisions of the Wisconsin statute, Mr. Justice McReynolds said (p. 145):

> "There is nothing in the record to indicate that when contracting with its stevedores the Dock Company actually agreed to subject itself to the liabilities imposed by the State Compensation Act. And it is enough here to say that the State had no power to impose upon an employer liabilities of that kind in respect of men engaged to perform the work of stevedores on shipboard."

(c) *An insurance company, directly liable by statute to an injured employee, is not estopped to raise the question of the applicability of a local compensation act.*

Another argument advanced in an effort to avoid the application of the uniformity doctrine is based upon the fact that under some state statutes the employer's insurance carrier is made directly liable for compensation to an injured employee. It is argued therefore that the insurance carrier is the sole party in interest, is directly bound by its policy contract and is estopped to repudiate an obligation voluntarily assumed for a valuable consideration. The Pennsylvania legislation contains such provisions, as it defines "employer" as including the insurer, and requires that the insurance carrier agree to be responsible directly to the employee for payment of compensation.*

* Act of June 2, 1915, P. L. 769, Section 1, as supplemented by the Act of June 26, 1919, P. L. 642, Section 401, Article IV, P. L. 659.

After referring to this legislation, the Superior Court of Pennsylvania concluded (R. 17): "The judgment in this case against the insurer is in accord with the statute." The same argument is made by the appellee in his Reply filed in this Court to appellant's Statement as to Jurisdiction on Appeal, wherein it is contended (p. 4): "The insurance carrier may not lawfully agree to render compensation in case of injury, accept a premium or premiums therefor, and not be estopped to set up as a defense to an award against it that the Act under which they had agreed to act is unconstitutional."

Such an argument too obviously begs the question to merit a reply. The insurance carrier agrees to render compensation, and accepts a premium therefor, in cases where the claim is **within the jurisdiction of the Pennsylvania Workmen's Compensation Board.** It does not agree to render compensation upon maritime claims, nor does it receive a premium therefor. Of course, if it be assumed that the claim in question is subject to the jurisdiction of the Workmen's Compensation Board, then the conclusion of the Superior Court of Pennsylvania and of the appellee is sound—**but that is the question of law under consideration.**

This same argument was made by the Industrial Accident Commission of California in the case of

James Rolph Co. v. Industrial Accident Commission, 220 Pac. 669 (1923),

one of the two cases considered by this Court in the case of *Washington* v. *Dawson (supra)*. The Cali-

fornia courts, however, detected the fallacy inherent in the argument and rightly repudiated it.

(d) *The doctrine is not limited to claims against the owner of the vessel.*

Efforts have also been made to base the doctrine of the *Jensen case* upon the fact that the employer—defendant therein, was the owner of the vessel; upon the theory that while the application of local workmen's compensation acts as against such an employer would interfere with the proper harmony and uniformity of the general maritime law, the application of such acts as against an independent stevedoring concern or a ship repairing company would not have that effect.

The absurd result of such an argument is to maintain that if two stevedores or repairmen be working on a vessel, one of whom is employed by the owner of the vessel and the other by an independent contractor, and both be injured on board the vessel as a result of the same accident, the former could recover only in admiralty while the latter would be subject to the jurisdiction of the local workmen's compensation act. Mr. Justice Holmes said in the case of

International Stevedoring Co. v. Haverty, 272 U. S. 50, 52.

"We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship."

Neither can we believe that this Court would countenance such a distinction. In a number of cases before this Court, a local workmen's compensation act has been held inapplicable notwithstanding the fact that the employer was not the owner of the vessel, as for example:

Messel v. Foundation Co., 274 U. S. 427 (post);
Northern Coal & Dock Co. v. Strand, 278 U. S. 142 (post);
March v. Vulcan Iron Works, 102 N. J. L. 337 (1925) (Cert. denied, 271 U. S. 682);
Danielsen v. Morse Dry Dock Co., 235 New York 439 (1923) (Cert. denied, 262 U. S. 756).

(e) *No case presents a "matter of mere local concern" in which concur the facts: (1) that the employee was working under a maritime contract, (2) that his activities at the time he was injured had direct relation to navigation and commerce, and (3) that he was injured while on board a vessel lying in navigable waters.*

As a necessary corollary to the uniformity doctrine it has always been held that state workmen's compensation acts may be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. Having been rebuffed in all of the direct and indirect assaults upon the uniformity doctrine above discussed, the favorite resort of its opponents now is to designate almost any set of facts

arbitrarily, as a "matter of mere local concern," again disregarding entirely the significance of that phrase as it has been defined by this Court. We wish therefore to consider the facts in the cases which this Court has designated as matters of local concern.

In the *Rohde case (supra)* the matter was clearly of mere local concern because the contract for constructing the vessel was non-maritime, and as the vessel was uncompleted when Rohde was injured, neither his general employment nor his activities at the time had any direct relation to navigation and commerce.

In the case of

State Industrial Commission v. Nordenholt, 259 U. S. 263,

a stevedore engaged in unloading a vessel at a pier in New York Harbor was injured while on the dock (an extension of the land). It was held that the Workmen's Compensation Act of the State of New York applied to the case, and in pointing out the difference between its facts and the facts in the *Jensen case,* Mr. Justice McReynolds said (pp. 272-3):

> "When an employee, working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of the employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The

liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land.

"The injuries out of which *Southern Pacific Co.* v. *Jensen* arose occurred on navigable waters, and the consequent rights and liabilities of the parties were prescribed by the maritime law. The question there was whether these rules could be superseded by the Workmen's Compensation statute of the State, and this court held they could not. In the opinion, citing *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 59, 60, we said, 'The work of a stevedore in which the deceased (Jensen) was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction.' "

and referring to the *Rohde case, supra,* he said (p. 275):

"Neither the general employment contracted for nor the workman's activities at the time had any direct relation to navigation or commerce—it was essentially a local matter * * *."

In the case of

Millers' Indemnity Underwriters v. Braud, 270 U. S. 59,

the decedent, while employed as diver by a shipbuilding company, submerged from a floating barge

anchored in the navigable Sabine River in Texas, for the purpose of sawing off the timbers of an abandoned set of ways, formerly used for launching ships, which had become an obstruction to navigation. An award under the Texas Compensation Act was affirmed. The opinion of the lower court* points out the fact that the employment in this case was not maritime, as the abandoned set of ways at which decedent was working extended out from the shore and therefore in legal contemplation was a part of the land. It is clear that as the ways or piling on which decedent was working at the time existed only in that locality in the Sabine River and could not exist elsewhere, the application of the state act to his case could not possibly affect the uniformity of the general maritime law.

This Court refused a certiorari (270 U. S. 655) to the Texas Court of Civil Appeals in the case of

Southern Surety Co. v. Crawford, 274 S. W. 280 (1925),

in which the local act was applied upon a claim for compensation made by a deck hand upon a non-self-propelled dredge engaged in dredging an inland harbor channel. The facts as stated by the lower court clearly show why the matter was of mere local concern. That court said (p. 280):

"Here, under the unquestioned findings of the trial Court, the dredge was not a seagoing

* Millers' Indemnity Underwriters *v.* Braud, 245 S. W. 1025 (1922) (Texas Civ. App.).

vessel, nor even self propelled, but had to be towed everywhere; nor was it at the time of the casualty mediately or immediately engaged in navigation or commerce as such of any nature, being then located up in the Texas City channel in Galveston Bay within Galveston County, Texas, and actively at work dredging the channel at that local point."

The Court also said (p. 281):—

"The fact that the dredge was a floating one on navigable waters does not take this casualty out of the operation of the principle applied to these authorities, because the employment here—that of a deck hand on a non-self-propelled boat engaged in the improvement of a Texas inland harbor channel, even if maritime at all, is yet, within their meaning, to be deemed of such a local nature as not to materially affect any rules of the sea whose uniformity is essential."

In the case of *State Industrial Board* v. *Terry & Tench (supra),* it was evident from the facts as stated in the opinion of the New York Court, why the matter was of mere local concern. The claimant was injured while standing on a floating raft, employed in the construction of a pier in New York Bay. The floating raft was not a vessel which could be used in commerce, and the New York Court pointed out that while the claimant's injury was maritime, the contract of employment was not.

In the case of

Rosengrant v. Havard, 273 U. S. 664,

a decision of the Supreme Court of Alabama, sustaining an award of compensation under the state act, was affirmed in a *per curiam* opinion "on the authority of *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469, and *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59."

The facts appear in the state reports: 211 Ala. 605, and 213 Ala. 202. Decedent's work was to tally and grade lumber as it was being unloaded from a barge into the defendant's planing mill, located on the bank of the Mobile River. Lashed to the barge was a schooner, also moored in the river. A tug boat was waiting nearby to tow away the barge when unloaded. Decedent was not doing any of the physical labor of moving the lumber, but was sitting on the schooner with pencil and book in hand tallying the lumber, when a bullet from a pistol in the hands of a man on board the tug boat struck him, as it was accidently discharged. The Court said (213 Ala. at p. 203):

> "Mr. Havard was not doing any of the physical labor of moving the lumber, and the service he was performing when shot could have been performed as well on the dock or wharf as on the barge or schooner."

The Court further said (p. 204):

> "This finding of the trial court (referring to the above mentioned facts) shows that the contract of employment and the services to be performed under it had no direct relation to navigation and that it was not a maritime contract."

In the case of

T. Smith & Son, Inc. v. Taylor, 276 U. S. 179,

a longshoreman, employed in the unloading of a vessel at dock, was standing upon a stage that rested solely upon the wharf and projected a few feet over the water toward the vessel. He was struck by a sling loaded with cargo which was being lowered over the vessel's side and was knocked into the water, where some time later he was found dead. This Court held that the award of compensation under the Louisiana Workmen's Compensation Law was proper because "The blow by the sling was what gave rise to the cause of action. It was given and took effect while deceased was upon the land" (p. 182).

The following language which appears on p. 181 of the opinion, again indicates the test applied by this Court in such cases:

> "Deceased was engaged in maritime work under a maritime contract. If the cause of action arose upon the river, the rights of the parties are controlled by maritime law, the case is within the admiralty and maritime jurisdiction, and the application of the Louisiana Compensation Law violated Section 2, of Article III (of the Federal Constitution). But if the cause of action arose upon the land, the state law is applicable."

In the case of

Alaska Packers Ass'n v. Industrial Accident Commission, 276 U. S. 467,

the claimant, while standing on the land in Alaska endeavored to push into navigable water a stranded

boat 26 feet long, in order that it might be floated to the dock nearby and lifted thereon, to be stored for the winter. While so engaged, the claimant sustained bodily injuries for which the California Industrial Accident Commission awarded compensation. The claimant had been employed to go to his employer's cannery in Alaska, and upon his arrival there, to do anything he was told to do. This Court said (p. 469):

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. * * *. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. The work was really local in character."

In the case of

Sultan Rwy. & Timber Co. v. Dep't of Labor, 277 U. S. 135,

it appeared that the Department of Labor of the State of Washington had issued an order directing the two plaintiffs in error to make reports and deposits as required by its Compensation Act. One of the complainants conducted logging operations and the work of its employees consisted of putting logs into booms after they had been thrown into a navigable river. The other claimant operated a sawmill on the bank of a navigable river and its

employees broke up the booms and guided the logs into the mill. In both instances, while the work in question was performed on a navigable river, it was done either before or after actual transportation. Clearly such work as above described had no relation whatsoever to navigation or commerce, and, in sustaining the judgment of the state court requiring the petitioners to make the reports and deposits required by the state workmen's compensation law, this Court said (p. 137):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity."

Let us now consider the cases in which the facts were of such a nature as to constitute more than a matter of mere local concern, because they involved characteristic features of the general maritime law or affected the proper harmony and uniformity of that law in its international and interstate relations.

In the case of

Doey v. Howland, 224 N. Y. 30, 36 (1918),*

the claimant's employer had taken a contract for the repair of an ocean-going vessel while it was tied up at a pier in navigable waters. Claimant while

* Certiorari denied, 248 U. S. 574.

employed as a carpenter on board the vessel fell down a hatchway and sustained fatal injuries. The State Industrial Commission made an award of compensation but the Appellate Division reversed this award and the Court of Appeals affirmed its action, holding that as Doey was performing a maritime contract the Commission had no jurisdiction under the doctrine of the *Jensen case*. The Court said:

> "In the present case, upon the conceded facts, I am of the opinion that Doey was, at the time he met his death, engaged in the performance of a maritime contract. His employer had taken a contract to repair an ocean-going vessel, preparatory to its taking on a cargo of grain. Doey was one of several carpenters employed to make the necessary changes. He was, at the time he was killed, engaged in such work on a steamship then in navigable waters. The contract to make the changes was certainly maritime in its nature. Preparing a steamship to receive a cargo is as much maritime in nature as putting the cargo on or taking it from the ship. Nor was the nature of the contract changed in any way because the contractor did not actually do the work himself, but employed others to do it for him. Doey's contract of employment was just as much of a maritime nature as was that of his employer."

In the case of

Great Lakes Dredge & Dock Co. v. Kierjewski, 261 U. S. 479,

the decedent, a master boiler maker employed by the appellant, was engaged in making repairs upon

a scow moored in the navigable waters of Buffalo River. During the course of said employment the float upon which he was working was negligently swamped and he was precipitated into the river where he drowned. The question on appeal was whether the District Court had jurisdiction to entertain the libel by which the defendant in error sought to recover damages for the death of her husband. This Court held that such jurisdiction was properly exercised by the District Court, and in referring to the *Rohde case* said (pp. 480-81):

> "In the cause last cited neither Rohde's general employment nor his activities had any direct relation to navigation or commerce—the matter was purely local—and we were of opinion that application of the state statute, as between the parties, would not work material prejudice to any characteristic feature of the general maritime law or interfere with its proper harmony or uniformity.
>
> "Here the circumstances are very different. Not only was the tort committed and effective on navigable waters, but the rights and liabilities of the parties are matters which have direct relation to navigation and commerce. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *State Industrial Commission of New York* v. *Nordenholt Corporation*, 259 U. S. 263."

In the case of

Gonsalves v. Morse Dry Dock & Repair Co., 266 U. S. 171,

the claimant also at the time of the accident was engaged in repairing a steamship resting in a floating dock in navigable waters at Brooklyn. He was injured while on board the vessel "through the explosion of a blau torch." A libel in admiralty had been dismissed by the District Court for want of jurisdiction. The decision was reversed by this Court on appeal, on the ground that the matter was clearly within the admiralty jurisdiction.

In the case of

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449,

it appeared that Dahl was doing repair work on a steamer lying in navigable waters in Brooklyn. A scaffold on which he was working broke and caused him to fall into the hold. The lower Court in its charge attempted to apply a rule of evidence created by a New York Statute. This Court held that was error and said (p. 457):

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

and in distinguishing the *Rohde case,* said (p. 457):

> "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel. The matter was not of mere local concern, as in *Grant Smith-Porter Company* v. *Rohde,* 257 U. S. 469, 476, but had direct relation to navigation and commerce, as in *Great Lakes*

Dredge & Dock Co. v. *Kierjewski,* 261 U. S. 479. The rights and liabilities of the parties arose out of and depended upon the general maritime law and could not be enlarged or impaired by the state statute."

The facts involved in the case of

Messel v. Foundation Co., 274 U. S. 427,

are quite similar to the facts in the case at bar. Messel was employed by the Foundation Company as helper to a boiler maker. He was sent with the boiler maker on board a steamship then afloat on the Mississippi River at New Orleans. The task to be performed was to add eight feet to the steamer's smoke stack. While engaged in this work Messel was brought directly over the mouth of the steam escape pipe running from the engine room. The escaping steam from the pipe inflicted the injuries upon him.

He filed a petition in the state Court under a certain section of the Louisiana Civil Code and also claimed, in the alternative, under the local workmen's compensation act if it could constitutionally apply. The state courts held that in view of the decisions of this Court in the Jensen and other cases, the workmen's compensation act could not be applied, and further held that as that Act was made exclusive by its terms there could also be no recovery under the section of the Civil Code referred to.

In reversing the decision of the state courts, this Court held that although on the facts involved the

local workmen's compensation act could not be applied, yet the claimant might sue under the state Civil Code, as such remedy was expressly saved by Section 9 of the Judiciary Act, and that the principles applicable to a recovery in the state court, of course (p. 434): "must be limited to those which the admiralty law of the United States prescribes, * * *."

Mr. Chief Justice Taft, speaking for this Court, said (p. 434):

> "As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the Workmen's Compensation Act, which is inapplicable to his case in view of our decisions, the judgment of the Supreme Court of Louisiana must be reversed. * * *"

Mr. Chief Justice Taft also indicated in this opinion the kind of situation which is not a matter of mere local concern when he interpreted the doctrine of the *Jensen* and other cases as holding (pp. 431-2):—

> "* * * that a Workmen's Compensation Act could have no application to an injury to one working as an employee on a vessel afloat on the waters of the United States, where his work was upon a maritime contract and the rights and liabilities of the parties were matters clearly within the admiralty jurisdiction, * * *."

The facts appearing in the foregoing case, which in their important features are almost exactly identical with the facts of the case at bar, were therefore definitely considered by this Court as constituting more than a matter of mere local concern so that the

local workmen's compensation act was inapplicable in view of the former decisions of this Court.

In the case of

Northern Coal & Dock Co. v. Strand, 278 U. S. 142; 73 L. ed. 99 (supra),

the employer, as appears from the recital of facts contained in the concurring opinion of Mr. Justice Stone, was a wholesale coal dealer. It neither owned nor controlled any ships and had no connection with maritime affairs except that it owned a dock at which coal was delivered to it from time to time from ships. The regular work of the decedent, an employee of the coal company, was non-maritime and he spent only two per cent. of his time helping to unload his employer's coal from the vessels. While on board a steamer, assisting in the discharge of her cargo of coal, he was struck by the clam-shell and instantly killed.

A claim for compensation under the Wisconsin Act was filed, and an award was made. The decision of the Supreme Court of Wisconsin affirming that award was reversed by this Court. The facts which made the cause of action maritime and prevented the application of the local workmen's compensation act are stated by Mr. Justice McReynolds in the following language (p. 144):

> "Strand's employment contemplated that he should labor both upon the land and the water. When killed he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment,

so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law * * *.

"The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

The opinion proceeded to hold that the claimant at the time of his death was a "seaman" within the intendment of the Jones or Merchant Marine Act;* that Section 33 of that Act incorporated the Federal Employers Liability Act into the maritime law of the United States; that the rights and remedies afforded by that act were exclusive; and that as Congress had provided a remedy to secure damages resulting from death, no state statute could provide any other or different one.

The most recent reported case of this nature is the case of

London Guarantee & Accident Co. v. Industrial Accident Commission, 73 L. ed. 368; (U. S. Supreme Court Advance Opinions May 1, 1929).

An award had been made by the Industrial Accident Commission of California, and affirmed by the

* Act of June 5, 1920, 41 Stat. at L. 1007, c. 250 (U. S. C. Title 46, Section 688).

Supreme Court of California, for the death of an employee of The Morris Pleasure Fishing, Inc. This company owned a number of small fishing vessels equipped with gas engines used for the accommodation of the public seeking recreation in deep-sea fishing, and the decedent was employed as a skipper to assist with the navigation of these vessels. The boats were capable of cruising a distance of 500 miles but made regular daily excursions of from three to five miles. One of the boats broke from her moorings during a storm, and decedent in an effort to save it put off from shore in an 18 foot boat, which capsized, resulting in the drowning of the decedent.

The Industrial Commission contended, *inter alia,* that the matter was one of local concern which did not affect commerce or navigation, that the vessel in question was not engaged in interstate or foreign commerce, and that it had jurisdiction to make an award under the state Compensation Act.

Mr. Chief Justice Taft, speaking for the majority of this Court reviewed all the cases on the subject and said (p. 373):

> "The conclusion sought to be drawn by counsel for the Commission from the Rohde and other cases is that workmen's compensation acts will apply unless their application would interfere with the uniformity of the general maritime law in interstate and foreign commerce, and there is neither here. But this omits one of the grounds for making an exception—that it shall not be prejudicial to the characteristic features of the

maritime law. That is just what it would be here, for here we have a transaction on the navigable waters of the United States which in every respect covers all the characteristic features of maritime law and has no other features but those. To apply to such a case a state compensation law would certainly be prejudicial to those features."

While this Court has unquestionably established a definite principle to the effect that no matter is of mere local concern which involves characteristic features of the general maritime law or affects the proper harmony or uniformity of that law in its international and interstate relations, it has not, of course, attempted in any case to indicate and define by an all-inclusive rule what facts or groups of facts make a case one of mere local concern.

A consideration of the foregoing cases however, and a comparison of the facts in the cases where a state act has been applied because the matter was local, with the cases in which the application of a state act has been denied, will serve to indicate clearly what facts are significant and controlling. Certainly if any class of cases has been established as of more than local concern, to which a state workmen's compensation act cannot apply, it is the class of cases in which there concur: (1) the fact that the employment was maritime; (2) the fact that the claimant, at the time of the injury, was working on board a vessel lying in navigable waters; and (3) the fact that at the time the injuries were sustained, his activi-

ties had direct relation to navigation and commerce, for example, the unloading of a vessel or repairing a vessel.

POINT B.

The Pennsylvania Workmen's Compensation Act, as construed by the Supreme Court of Pennsylvania to be applicable to regulate the rights and remedies of the appellee, a workman injured while engaged in performing repairs to and upon a steamship lying in navigable waters, is unconstitutional.

This case has now been considered by five different tribunals, to-wit, the Referee, the Workmen's Compensation Board, the Court of Common Pleas of Philadelphia County, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania, and although each has held the local compensation law applicable, each decision has been based upon entirely different reasoning than those preceding it. **Indeed each successive decision has either ignored or expressly disapproved the reasoning of its predecessors.**

The decision of the Referee was based upon a gratuitous finding, without a shred of evidence to support it, that the steamship "Bald Hill" was "out of commerce" at the time the claimant was injured. We do not know, in view of the facts in this case and the decisions in similar cases, what the Referee meant by the phrase "out of commerce," or what legal significance he attached to it. If he meant by the phrase that at the time the repairs were being performed, the vessel was not actually *en voyage,* he,

of course, stated a truth, but that statement had no legal significance. If he meant that because the vessel was not actually *en route* from one port to another when the injuries were sustained, but was tied up at a pier undergoing repairs, the vessel was for that reason not subject to the jurisdiction of the admiralty and maritime law, he was clearly wrong: *The Robert W. Parsons,* 191 U. S. 17; *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449 (*supra*); *New Bedford Dry Dock Co.* v. *Purdy,* 258 U. S. 96.

Indeed, as was stated in the opinion of the Supreme Court of Pennsylvania (R. 21): "The referee's statement that the vessel was out of commerce is in itself inconsistent with the finding that the vessel 'had steamed to Philadelphia to have certain repairs made.'"

The reasoning upon which the decision of the Workmen's Compensation Board is based is rather obscure. After resorting to Webster's International Dictionary for a definition of the limits of admiralty jurisdiction, and quoting definitions of the term "seaman" from various text books and statutes, the opinion cites the *Rohde case,* without indicating the basis of its alleged applicability to the instant case, and then seems to rely upon the reasoning of an English case which argued that "so far as concerns a man working on a ship, if the ship is in a dock, the dock being a factory, the ship is in a factory, and therefore a man working on the ship is working in a factory."

The Court of Common Pleas of Philadelphia County thought that the issue in this case depended upon the distinction between accidents happening to one while working on or with things which are in actual use as instrumentalities of both interstate and intrastate commerce, and those occurring to persons while employed or working on things then being put in position for such common use in the future. That court saw no significance in the *Jensen case,* the *Nordenholt case* and the *Knickerbocker case,* saying that they threw no light on the subject under discussion.

The decision of the Superior Court of Pennsylvania, as has been noted, was based upon the alleged distinction between a compulsory workmen's compensation act and an elective compensation act.

The opinion of the Supreme Court of Pennsylvania points out the fallacy of the Superior Court's reasoning, and then, other reasons for applying the state workmen's compensation act having failed, it proceeds to invent and advance entirely new theories for evading the application of the uniformity doctrine and sustaining the jurisdiction of the state act. This opinion shows either that the ingenuity of the opponents of the uniformity doctrine is not yet exhausted, or that the Supreme Court of Pennsylvania, in considering at length the various decisions of this Court, entirely ignored the *ratio decidendi* of the cases to which it referred.

The contentions of the Pennsylvania Supreme

Court upon which its decision is based, are that under the circumstances in the case at bar the parties had "contracted with reference to the state statute," that the appellee's activities at the time his injuries were sustained had no direct relation to navigation and commerce, that the rule of the *Jensen case* does not apply unless the claimant's general and regular employment was maritime, which was alleged not to be the case here, and that the rule of the *Jensen case* does not apply where the injuries were purely accidental and not the result of a tort, which was alleged not to exist in the case at bar.

I. The parties in the case at bar are not "clearly and consciously within the terms of the state statute," and they did not contract with reference thereto.

The Workmen's Compensation Act of Pennsylvania (June 2, 1915, P. L. 736, Article III, Section 301), in force at the time appellee's injuries were sustained, provides:

> "When employer and employee shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employee, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence * * *."

Section 302 (*a*) provides:

> "In every contract of hiring * * *, it shall be conclusively presumed that the parties have

accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party * * * be filed with the Bureau within ten days * * *."

Under the provisions of Section 305 of said act (as amended by the Act of April 7, 1921, P. L. 114, No. 67, Section 1) an employer is not required to contribute to the State Workmen's Insurance Fund, but may insure in any insurance company authorized by the Commonwealth to insure such liability, or may, upon satisfactory proof of financial condition, obtain a certificate of exemption from the obligation to insure. Employees are not under any circumstances obliged to contribute to the said Insurance Fund.

The opinion of the Supreme Court of Pennsylvania states (R. 35):

"This contractor, third-party employer, and the plaintiff had agreed between themselves that, in case of injury to the latter during the course of his employment, he would be entitled to compensation according to a schedule in the state compensation act. Here, as much as in the *Rohde case,* we think it can be said, 'the parties, plaintiff and defendant, contracted with reference to the state statute' * * *."

The record discloses no such agreement between the parties, other than the agreement implied and imposed upon the parties by the foregoing provisions of the act. There was no contribution by both or either of the parties to the Insurance Fund. Under these circumstances the Court's conclusion that "Here, as much as in the *Rohde case,* we think it can be said 'the parties, plaintiff and defendant, contracted with reference to the state statute,' " is clearly based upon a misconception of the significance of that statement in the *Rohde case.*

Mr. Justice McReynolds said in the *Rohde case* (p. 476): "And as both parties had accepted and proceeded under the statute by making payments to the Industrial Accident Fund it cannot properly be said that they consciously contracted with each other in contemplation of the general system of maritime law." And again (p. 477): "Here the parties contracted with reference to the state statute; * * *."

In *Millers' Indemnity Underwriters* v. *Braud (supra),* Mr. Justice McReynolds, referring to this statement in the *Rohde case,* said (p. 64):

> "Stressing the point that the parties were clearly and consciously within the terms of the statute and did not in fact suppose they were contracting with reference to the general system of maritime law, we alluded to the circumstance, not otherwise of special importance, that each of them had contributed to the industrial accident fund."

Attempts have been made, as was made in the case at bar, to clothe with some mysterious significance the statement that in the *Rohde case* the parties were "clearly and consciously within the terms of the statute." Certainly no mystery is involved in the phrase. The parties were *clearly* within the terms of the statute because the contract was non-maritime, and they were *consciously* within its terms because each of them had contributed to the industrial accident fund.

In the case at bar the parties, upon the facts and the authorities, were neither clearly nor consciously within the terms of the state statute, nor can it be said that they contracted with reference thereto. It was held in

Union Fish Co. v. Erickson, 248 U. S. 308, 313,

that when entering into maritime contracts the parties contemplate the system of maritime law and its well known rules control their rights and liabilities to the exclusion of state statute: *State Industrial Commission* v. *Nordenholt Co.,* 259 U. S. 263, 274 (*supra*).

The contract of the appellant John Baizley Iron Works to repair the steamship "Bald Hill" was a maritime contract; appellee's contract of employment in so far as it required him to assist in making such repairs was also maritime. The parties therefore were *clearly* not within the terms of the state statute with reference to such work, and as to such work did not contract with reference thereto. And

they were not *consciously* within its terms because neither contributed to the state insurance fund.

II. The terms of the general contract of employment between the parties are unimportant.

Another contention which appears throughout the opinion of the Supreme Court of Pennsylvania, as one of the bases of the decision, is that "there is nothing here to show the scope of Span's general employment contemplated maritime work * * *" (R. 21). It is said (R. 24):

> "For the present, it is enough to note that the record now before us does not show any contract of general employment between plaintiff and defendant Iron Works, nor suggest that Span was originally engaged on, in or about ships. Apparently he was a land man, under a land contract of employment; * * * whereas, in each of the four cases just reviewed, the injured person was employed by a concern directly and apparently exclusively, engaged in maritime work, and the records there involved indicate or strongly suggest that his original employment contemplated work having some direct relation to navigation or commerce."

While it is true that the record of the testimony given before the Referee is silent as to the nature of the general employment between appellee and appellant Iron Works, and the nature of the general activities both of the employer and the employee, it is also true that the Court's assumption that "apparently he (appellee) was a land man, under a

land contract of employment" is wholly gratuitous and is based upon nothing in the record.

The best evidence that Span's original employment contemplated maritime work is the fact that he was actually on shipboard, engaged in such work at the time his injuries were sustained. That the work which Span was doing at the time was within the scope of his general employment must necessarily have been found by all of the Pennsylvania courts, otherwise the award could not have been sustained.

Furthermore, the statement is unimportant and has no legal significance. If the appellee, at the time his injuries were sustained, was employed on shipboard in work of a maritime nature and his activities had direct relation to navigation and commerce, a state compensation act cannot be applied even though his general employment and usual activities may not have been maritime. In

Northern Coal & Dock Co. v. Strand, 278 U. S. 142 (supra),

the same contention was made. The employer was a wholesale coal dealer, which had no connection with maritime affairs except that coal was delivered to it from time to time in ships. Mr. Justice Stone said in the concurring opinion (p. 148): "The employee's regular work was non-maritime and he spent but two per cent. of his time [approximately one day every two months] unloading his employer's coal from ships." Commenting upon these facts, the majority opinion states (p. 144):

> "The fact that Strand worked for the major portion of the time upon land is unimportant. He was upon the water in pursuit of his maritime duties when the accident occurred."

III. Span's activities at the time his injuries were sustained had direct relation to navigation and commerce.

As is indicated by the foregoing quotation from the Strand case, the important question concerning the claimant's work is not its general scope but the nature of his activities at the time the injuries were sustained. The opinion of the Supreme Court of Pennsylvania admits (R. 35) that this is an important factor in ascertaining whether a state compensation act may be applied in a particular case, but then proceeds to hold that in the case at bar, Span's activities at the time of the accident had no direct relation to navigation or commerce. The opinion states (R. 33):

> "We may here remark that, while the kind of work plaintiff in the present case was doing at the time of his injury might be said to have a certain remote relation to navigation and commerce, yet it seems to us that such work cannot be held to bear any 'direct' relation to those subjects."

and after reviewing the authorities, the Court concluded (R. 36):

> "In the cases which we have discussed, where admiralty took jurisdiction to the exclusion of

> the local law, the injury occurred while the person in question was engaged in activities which had a much plainer and more direct relation to navigation than the work of the present claimant."

We submit that certainly no activities of any nature can have a more direct relation to navigation and commerce than the performance of repairs to a vessel. The Pennsylvania Supreme Court attempts to exclude from a consideration of this question the *Jensen case* and other so-called "stevedore cases" (R. 25-6), on the ground that they are *sui generis.* The activities of a stevedore on board a vessel are unquestionably maritime: *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 62; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52. A stevedore is a porter engaged in carrying, loading and unloading a vessel's cargo. His general activities are not inherently maritime; the important features of his labor, in this connection, are that his work is performed on shipboard, and that it relates to the vessel's cargo. Similarly, although the work of a carpenter, boilermaker or blacksmith is not inherently maritime, the activities of such mechanics when engaged in making repairs to and upon a vessel, certainly have no less a direct relation to navigation and commerce than the activities of a stevedore.

We need but refer to a few of the cases to show that this Court has never made such a distinction. In the case of *Great Lakes Dredge & Dock Co.* v.

Kierjewski (supra), the claimant was a boilermaker, engaged in making repairs to a vessel in navigable waters.

In *Gonsalves* v. *Morse Dry Dock Co. (supra)* and in *Robins Dry Dock & Repairs Co.* v. *Dahl (supra),* the precise kind of work being performed by the respective claimants does not appear, other than that each was doing "repair work" upon a vessel lying in navigable waters.

In *Messel v. Foundation Co. (supra),* the claimant was a boilermaker's helper. He and the boilermaker were adding eight feet to the smokestack of the vessel when the injuries were sustained. Just what Messel was doing to assist in the work at the time does not appear, nor does it seem to have been considered material.

In *March* v. *Vulcan Iron Works (supra),* the employee was a foreman of a boiler shop and was attempting to board the vessel for the purpose of inspecting its boilers when his injuries were sustained.

In *Doey* v. *Howland (supra),* the employee was a carpenter, engaged in making repairs to the vessel when he was killed.

In *Danielsen* v. *Morse Dry Dock & Repair Co. (supra),* the claimant had been employed as a "burner" and was engaged in burning the bolts and metal plates at the time his injuries were sustained.

In the case at bar, the appellee, Span, was employed as a blacksmith's helper (R. 8). In his claim petition

he stated (R. 2) that he was painting the angle irons on board ship at the time of the accident, and he testified before the Referee (R. 4) that he "was painting the iron in the engine room." He further stated in his claim petition (R. 2) that another employee of the John Baizley Iron Works "was cutting iron with an acetylene torch," and testified (R. 5) that he called to this fellow employee and told him "to burn the iron on the other side," and that in so doing the sparks from the acetylene torch entered his eye.

We submit that the activities of this appellee, both upon the facts and upon the authorities, had as direct a relation to navigation and commerce as the activities of any of the claimants in the above mentioned cases. Can a distinction be made between the painting of a ship's boiler and other repairs thereto, such as the replacing of a section? Who can say that the painting of a boiler so as to preserve it and enable it to function properly on the voyage is any less important or bears any less direct a relation to navigation and commerce than, for example, replacing a section of the boiler so as to preserve it and enable it to function properly?

IV. The fact that Span's injuries may not have been due to a tort, is no reason for permitting the application of the local act.

Although the opinion of the Pennsylvania Supreme Court dwells upon the matters above discussed, the

ratio decidendi, if there be one, will be found, we believe, in the Court's statement that Span's injuries were not the result of a tort. The opinion states (R. 36-7):

> "Moreover, in each of those cases [discussed in this opinion] the injuries resulted from a maritime tort—that is, a wrongful act committed on the high seas or on navigable waters: * * * in all the federal cases where admiralty relief was afforded to physically injured persons who were not members of the crew of or constantly attached to the ship on which they were hurt, the injuries were attributable to a maritime tort—a fact emphasized in each instance * * *. Here, as previously stated, no tort was committed; so far as the record indicates, the injury to plaintiff was purely accidental. Under these circumstances, since plaintiff cannot in any proper sense be classed as a seaman, entitled in admiralty to a measure of relief for accidental injuries (see *The Osceola,* 189 U. S. 158), to refuse application of the local compensation law would in effect deprive him of all relief."

Before passing to a consideration of the legal aspects of this argument, we wish to observe that the Court's statement to the effect that no tort was committed in this case is not based upon any finding of fact by the Referee, nor upon affirmative testimony **The existence or non-existence of a tort was conceived to be wholly immaterial in the proceedings before the Referee and no effort therefore was made either by appellee or by appellants to establish it.**

The only testimony as to the manner in which the accident occurred is found in the statement of the claimant (R. 5) that "as soon as he put the torch to the iron why the flame caught me in the eye." Whether the injuries were due to improper or careless operation of the acetylene torch, or to the fact that the torch was not in good condition, does not appear. Upon this state of the record, however, the Pennsylvania Supreme Court **affirmatively** finds that no tort was committed, and upon such a finding bases its conclusion that the application of the local law will not impinge upon admiralty jurisdiction.

The argument is obviously *ad hominem*, and blandly ignores the legal principles upon which the issue before the Court must be decided. The issue is not whether a remedy is afforded under the maritime law, but whether a state has power to enact legislation which grants to its tribunals jurisdiction over a maritime cause such as is here disclosed. Certainly the many cases which have been considered by this Court since the *Jensen case*, do not turn upon a mere question of fact, whether the injuries in each case were the result of a tort or were purely accidental.

As was said by this Court in the *Jensen case (supra)* at pp. 216-17:

> "A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national in its character, and admits and requires uniformity of legislation, affecting alike all the States, such as trans-

> portation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507, * * *. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved."

A final, and, we believe, conclusive answer to this position of the Pennsylvania Supreme Court is the fact that in most of the cases wherein this Court has held inapplicable a local workmen's compensation act because it trenched upon the general maritime law, there was no evidence of the commission of a tort.

In the *Jensen case (supra)*, the claimant's duties were to operate a truck which was used in removing the cargo from the vessel to the pier. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces of the gangway. Jensen then reversed the direction of the truck and proceeded backward into the hatchway. He failed to lower his head, which struck the top of the hatchway, throwing his head forward and breaking his neck. That there was no tort committed by or attributable to the defendant in this case appears not only from the foregoing recital of the facts, but also from the following statement

appearing in the dissenting opinion of Mr. Justice Holmes (p. 219):

> "And as such a liability [created by the New York Workmen's Compensation Act] can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault."

In the case of

Clyde Steamship Co. v. Walker, 244 U. S. 255,

which involved the same statute considered by this Court in the *Jensen case,* on substantially the same facts, it appeared (p. 257) that Walker, a stevedore, was hooking the rope of a derrick into a load of lumber in the between decks of the vessel for the purpose of unloading it, when his hand became jammed against the lumber, resulting in the injuries upon which the claim was based. Here also the record does not disclose a tort committed by the defendant.

In the case of *Knickerbocker Ice Co.* v. *Stewart (supra),* the only statement of the facts relating to the accident which appeared to this Court to be material is the statement (p. 155): "While employed by Knickerbocker Ice Company as bargeman and doing work of a maritime nature, William M. Stewart fell into the Hudson River and drowned." No tort is disclosed by that statement.

The facts involved in the case of *James Rolph Co.*

v. *Industrial Accident Commission (supra)*—considered by this Court in the case of *Washington* v. *Dawson (supra)*—appear in the State Report. The claimant was a stevedore, engaged in helping to unload a shipment of coal consigned to his employer. Before going below to the hold where he was required to work, he secured an iron plate used in the unloading process, and in attempting to throw the plate below, overbalanced and fell into the hold, sustaining injuries from which he died. These facts disclose no tort on the part of the employer.

That the decisions of this Court in *Washington* v. *Dawson* and other cases do not in any sense depend upon the existence or non-existence of a tort further appears from the case stated in the dissenting opinion of Mr. Justice Brandeis in *Washington* v. *Dawson,* which sets forth his interpretation of that decision. He states (p. 228):

> "A concern, doing a general upholstering business in New York, directs one of its regular employees, resident there, to make repairs on a vessel lying alongside a New York dock. The ship, then temporarily out of commission, is owned and enrolled in New York, and when used is employed only within the State. While on the vessel engaged in making the repairs, the employee is injured without the fault of any one and is disabled for life * * *."

In *London Guarantee & Accident Co.* v. *Industrial Accident Commission (supra),* the decedent was drowned when the boat in which he was riding was

capsized by a heavy wave. Certainly there was no tort attributable to the employer in this case.

In *March* v. *Vulcan Iron Works (supra),* the deceased, a foreman in the defendant's boiler shop, was climbing a ladder from the deck of the dry dock to the deck of the vessel when he fell to the deck of the dry dock and was killed. Here, also, no tort attributable to the employer was disclosed.

In all of the foregoing cases it was held that a state Workmen's Compensation Act could not be applied to regulate the rights and remedies of the parties notwithstanding the fact that in none of them was there disclosed a tort attributable to the employer. There would seem to be no doubt therefore that the question whether a Workmen's Compensation Act may change, modify or otherwise impinge upon the general maritime law, cannot be made to depend upon the existence or non-existence of a tort attributable to the employer.

Indeed, the argument of the Pennsylvania Supreme Court to the contrary, in view of the foregoing decisions, is incomprehensible. The cases which it cites in support of its minor premise have no relation to the problem which the court attempts to solve by its syllogistic reasoning. The *Imbrovek case,* the *Kierjewski* and the *Gonsalves cases* arose upon libels in admiralty based upon alleged tort. The existence or non-existence of a tort was material in ascertaining whether or not the maritime law afforded a remedy. But the fact that the existence or non-

existence of a tort was material in those cases is obviously of no significance in determining whether a State has the power to enact a Workmen's Compensation Law which confers upon its tribunals jurisdiction over a maritime cause.

CONCLUSION.

The doctrine of uniformity in admiralty and maritime matters enunciated by this Court, construes the federal constitution to forbid any state legislation which works material prejudice to any characteristic feature of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This doctrine remains unimpaired notwithstanding the numerous assaults upon it, and the efforts of its opponents to evade and circumvent it.

As a necessary and logical corollary to the doctrine, in matters of mere local concern, a state workmen's compensation act may apply to a situation which is otherwise maritime, for if the situation be one of mere local concern, *ex hypothesi* the application thereto of a state workmen's compensation act will not work material prejudice to any characteristic feature of the general maritime law, nor interfere with that law in its international and interstate relations.

But no case in which there concur the facts that an employee was working under a maritime contract, that his activities at the time he was injured had

direct relation to navigation and commerce, and that he was injured while engaged in such activities on board a vessel lying on navigable waters, presents a matter of mere local concern.

The Supreme Court of Pennsylvania has held that the rights and remedies in the case at bar must be regulated by the Pennsylvania Workmen's Compensation Act, although the parties did not contract with reference to the state statute, although the appellee at the time his injuries were sustained was engaged in maritime employment on board a vessel lying on navigable waters, and although his activities at the time had direct relation to navigation and commerce. As so applied, the Pennsylvania act works material prejudice to characteristic features of the general maritime law, and is therefore unconstitutional.

We, therefore, respectfully submit that this decision of the Supreme Court of Pennsylvania should be reversed.

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